permanent, but were not actually so, had abandoned the right which was incompatible with them during their existence. It is difficult in such a case to discern any sufficient reason for supposing that the disuse of the right was to continue longer than the works which prevented its exercise.

There could have been no question of the subsistence of the right, if the owner had declared his intention to resume possession, on the contingency which happened. The intention to relinquish the right absolutely was a fact not to be presumed.

It seems to have been assumed that the abandonment to be presumed from the construction of works incompatible with the exercise of the right, depends upon the intention of the party to whom the servitude is due, so that if the intention to preserve the right, notwithstanding the disuser, is declared, no abandonment will result from any disposition of the property which prevents the possession or use of the right. It is thus apparent that the intention to abandon a right is a fact to be proved, either by the circumstances of the case or the declarations of the party entitled to the servitude. S. F. D.

RECENT ENGLISH DECISIONS UPON LEADING QUESTIONS.

ANCIENT LIGHTS. EQUITABLE ASSIGNMENTS OF FUTURE ACQUISITIONS.

I. There is no subject more important to the practical lawyer than to be able to keep pace with the decisions of courts of last resort upon leading questions. By the imperfect and tardy mode of reporting in this country, it is almost impossible to do this, beyond the limits of the state where one resides. And even in regard to that limit, we often have to depend upon tradition and common report, for the decisions of the courts, for years. While we obtain the authentic decisions of the English courts in the London Jurist and Law Journal, and other English periodicals, by

every new arrival by steamers, brought down within a few weeks, at most, we often have to wait as many years for the only reliable reports of the American states. This defect is in part supplied by the early publication of select opinions of the judges in the Law Journals, and to some extent, and in an imperfect manner, by brief notes of cases, which in general afford but a poor guide to the real matter of the decisions themselves.

And in regard to the English cases, it is impracticable to afford them, in the American Law Journals, or in any other way, in such a form as to render them accessible to the great mass of the profession, until the appearance of the republication of the regular volumes of reports. To supply this defect in part we shall give, occasionally, the brief abstract of the English decisions upon Leading Questions, which is, after all, the most reliable guide we can have towards maintaining the just equilibrium of the advancing and varying progression of the principles of the common law, and of equity jurisprudence.

II. Within the last few months the English courts have been very much occupied by questions of ancient lights.

1. It seems to have been the early practice in the English courts to treat ancient lights as dating from the earliest limit of prescription, "during time whereof the memory of man runneth not to the contrary;" or from the time of Richard I. There are many evidences of this rule in the early cases, and the forms of declarations contained an allegation to that effect: *Aldred's Case*, 9 Co. Rep. fo. 57. And in *Bury* vs. *Pope*, Cro. Eliz. 118, it seems, from the opinions of the judges, that at that period, *thirty* or *forty* years was not a sufficient term to give windows the character of ancient lights. See also *Rosewell* vs. *Pryor*, 2 Salk. R. 459, s. c. 12 Mod. R. 215, where it seems to be required that some equivalent averment to the existence of the plaintiff's lights, "time out of mind," must be found in the declaration.

2. There seems no doubt that as early as the English Revolution, window lights which had become established by the legal time of prescription were entitled to be protected against obstruction: 3 Kent Com. 448; *Villers* vs. *Ball*, 1 Show. 7; *Palmer* vs.

Fletcher, 1 Lev. 122. And in modern times the period of prescription has been limited to twenty years, in regard to light and other incorporeal hereditaments: 3 Kent Com. 448; WILMOT, J., 1761, in *Lewis* vs. *Price*, 2 Saund. R. (Williams' ed.) 175, n. a, b, c. In *Daieet* vs. *North*, 11 East 371, it was held that twenty years' uninterrupted possession of window lights was sufficient ground from which a jury might presume a grant or covenant, provided the landlord had knowledge of the facts as well as his tenant.

3. But of late the most serious questions have arisen in regard to the rights of the respective parties, where the owner of these ancient lights, for his own accommodation, assumes to alter or enlarge the same. What course shall the adjoining owner pursue to prevent such altered lights acquiring the character of ancient lights? This question arose in *Renshaw* vs. *Bean*, 16 Jur. 814; s. c. 10 Eng. L. & Eq. R. 417. And after very elaborate argument, and an *advisare vult*, on the part of the court, it was decided, in an elaborate judgment by Lord CAMPBELL, Ch. J., with whom JJ. PATTESON, WIGHTMAN and COLERIDGE concurred, that where a party who had the right to access of the light and air through certain ancient windows, makes an alteration in the size of the windows, so as to exceed the limits of his ancient right, he thereby acquires nothing in addition to his former right; and if the excess cannot be obstructed by his neighbor in the exercise of his lawful rights on his own land, without at the same time obstructing the ancient right, such party must be considered as having by his own act suspended and lost for the time his former right. It was here doubted whether the ancient right was entirely destroyed by the alteration. And similar doubts are suggested in other and more recent English cases: *Wilson* vs. *Townend*, 6 Jur. N. S. 1109; s. c. 1 Drew. & S. 324, 330; *Hutchinson* vs. *Copestake*, 8 C. B. N. S. 102; 9 Id. 863; *Binsk* vs. *Pash*, 11 Id. 324.

But in the case of *Jones* vs. *Tapling*, 8 Jur. N. S. 333, which was heard in the Common Pleas in January 1862, before four judges, this question was distinctly raised, and the Chief Justice and WILLIAMS, J., were of opinion that the putting out new and

enlarging old windows, is not an abandonment of the right, but that on the dominant owner replacing his windows in their original state, the servient owner is bound to take down his wall, or whatever other obstruction he may have erected; and that its having been erected in a permanent manner did not afford a reason for keeping it up. While BYLES, J., held that the wall having been rightfully erected, the servient owner could not be called upon to remove it, because the dominant owner had seen fit to abandon his illegal claim. And KEATING, J., held that the dominant owner, by omitting an illegal claim, must be regarded as having abandoned his legal claim, in such a manner that he could not reassert it. The court being equally divided in opinion, the junior judge, KEATING, withdrew his opinion, and judgment passed for the plaintiff, that a writ of error might be brought in the Exchequer Chamber, where the case was heard, in July last, and reported in the May 9th number of the London Jurist. It was decided in the Exchequer Chamber, by four judges against two, POLLOCK, C. B., and MARTIN, B., dissenting, that where the owner of the dominant tenement has opened new lights in his house, in such mode that the owner of the servient tenement cannot prevent the right to the new lights attaching, and being gained as against himself, without obstructing the old lights, he is allowed to obstruct and excused from obstructing the old lights, so long as, and to such an extent as is necessary for him to do in order to prevent the attempted usurpation of the right to the new lights. But if the servient owner keeps up the obstruction, after the windows of the dominant owner are restored to their original state, he is liable as occupier of the land for maintaining an obstruction to the lights of his neighbor. These views, and the opposite, by the dissenting members of the court, are maintained in most elaborate opinions, reviewing the course of decision from the earliest period. All the judges concurred in the soundness of the decision of *Renshaw* vs. *Bean*, except BLACKBURN, J., and BRAMWELL B., who held the opposite view, in opinions which the London Jurist characterizes as "being rather long than luminous."

This must be regarded as settling the law in England, for the

present at least, unless the case should be carried into the House of Lords, of which we hear no intimation, and which we infer is not to be done. We must say, that to us, the opinion of the dissenting judges, both upon the ground that the assertion of an illegal claim must be regarded as an effectual estoppel upon the dominant owner afterwards reasserting his former legal claim; and also, that however this may be, it is certain that the servient owner having lawfully erected a permanent obstruction to the illegal assertion of claim, is not compellable to remove it, upon the dominant owner withdrawing his claim within legal limits, is more in consonance with equal moral justice, and also with legal principles as applicable to the acts of the several parties, than the opinions of the majority of the court of error. We trust the question may speedily be brought to the determination of the court of last resort, and that the judgment of the Exchequer Chamber will be reversed.

We are not aware that this precise question has arisen in this country, and we do not apprehend, if it should arise, that it would receive the same favorable consideration in behalf of the dominant owner, attempting to enlarge his rights by usurpation, as already stated. It is apparent, from a careful examination of the American cases, that there exists throughout the American States a very decided disposition to reject the doctrine of the English courts in favor of ancient lights. These will be found carefully analyzed in Professor Washburn's late work upon Easements and Servitudes, pp. 498–505.

In Massachusetts the last vestige of the English rule was abandoned in *Carrigg* vs. *Dee*, 14 Gray 583; see also *Rogers* vs. *Swain*, 10 Id.; *Collier* vs. *Price*, 7 Id. 18; *Fifty Associates* vs. *Tudor*, 6 Id. 255; *Johnson* vs. *Jordan*, 2 Met. 234; *Atkins* vs. *Chilson*, 7 Id. 398, 403.

In New York the same course of decision has been followed through a long succession of years: *Mahan* vs. *Brown*, 13 Wend. 261, 263; *Banks* vs. *American Tract Society*, 4 Sandf. Ch. 438; *Parker* vs. *Foote*, 19 Wend. 309; *Myers* vs. *Gemel*, 10 Barb. 537. See also *Radcliff* vs. *Mayor*, *&c.*, 4 Comst. 195, 200. And this

course of decision has been adopted in Maine: *Pierre* vs. *Fernald*, 26 Me. R. 436; and in Maryland, in *Cherry* vs. *Stein*, 11 Md. R. 1, overruling a former case in that state; and in *Haverstick* vs. *Sipe*, 33 Penna. St. R. 368, 371, following in the wake of former cases in that state; and in South Carolina, in *Napier* vs. *Bulwinkle*, 5 Rich. 311, overruling *McCready* vs. *Thomson*, Dudley 131.

Many of the other American States adhere to the rule of the English law upon this subject, which consideration, and the further one that the same rule in regard to claiming beyond the rights of the dominant owner, will apply to water rights, and other easements, as well as to that of ancient lights, will be a sufficient apology for this extended notice of the cases, upon the points which we have discussed.

III. The subject of the assignment of non-existing property, in equity, is one of great interest in these active commercial times. The assignment of future acquisitions will not become operative at law: *Robinson* vs. *Macdonnel*, 5 Maul. & Sel. 228. But in equity it is settled, by a long course of decisions, that such an assignment is perfectly valid and effectual, if made upon a valuable consideration: *Curtis* vs. *Auber*, 1 Jac. & W. 526; *Douglas* vs. *Russell*, 4 Sim. 524; s. c. 1 My. & K. 488; *Langton* vs. *Horton*, 3 Beavan 464; 1 Hare 549; *Lindsay* vs. *Gibbs*, 22 Beavan 522.

This subject came under consideration, in the recent case of *Holroyd* vs. *Marshall*, 9 Jur. N. S. 213, which was decided in August last. The question arose between a mortgagee of machinery in a mill or manufactory and a levying creditor. The mortgage was by the terms of the deed to be operative upon "all machinery, implements, and things which during the continuance of the security, should be fixed or placed in or about the mill and buildings, in addition to or substitution for the premises, or any part thereof." The assignment was made for the security of £5000, with the right of possession in the assignor or mortgagor until demand of payment and his default in meeting the same, and then for the mortgagee to sell and raise the sum for which the security was given. The schedule contained specified articles, and all other machinery, &c., then and thereafter in the mill. The

deed was duly registered, as a chattel mortgage, or bill of sale, and the mortgagor remained in possession of the mill, and placed other machinery there in addition to that which was there at the date of the deed.

It was held by Vice-Chancellor STUART, and this decree was affirmed by the House of Lords (notwithstanding the reversal of the same by the Chancellor, Lord CAMPBELL), that as between the mortgagee and an attaching creditor, the former was entitled to all the machinery in the mill, at the date of the levy of the execution, including the added and substituted machinery. That immediately upon the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed, in equity, to the mortgagees, to whom the assignor or mortgagor was bound to make a legal conveyance, and for whom he was in the mean time a trustee.

The opinion of Lord Chancellor WESTBURY, the present Lord Chancellor, is regarded as a masterly exposition of the application of equitable principles to the subject. Lord CAMPBELL, in reversing the decree of the Vice-Chancellor, seems to have gone upon the ground that there was no sufficient possession taken by the mortgagee, and that his title was at most an equitable one, and must yield to a more valid legal title, backed by equal equity, which he regarded as being the case with all *bonâ fide* creditors. The present Lord Chancellor, who gave the only opinion in the House of Lords, and upon which the decree of Lord CAMPBELL was reversed, goes into a most exhausting review of the subject, both upon principle and the decided cases, and shows very conclusively, that the equity of an equitable mortgagee, whether his right rest merely in contract, or be accompanied by constructive or actual possession, possesses so far a priority and advantage over the rights of a mere attaching or levying creditor, that it was competent for a court of equity to interfere to protect the former against the latter.

This decision, resting as it does upon most unquestionable grounds of principle and authority, cannot fail to have an important bearing upon similar contracts in this country, which have

been numerous, both in regard to railways, and the furniture and equipment of railways, and some of which have already been determined by our courts in favor of the equitable right of the mortgagees, without seeming to comprehend very fully the equitable grounds upon which they may be made to stand. See also *Hart* vs. *Farmers' and Mechanics' Bank*, 33 Vt. R. 252; *Pennock* vs. *Coe*, 23 Howard U. S. Rep. 117, where Mr. Justice NELSON and the counsel in argument go into an exhaustive examination and discussion of this question in all its bearings, and the learned judge arrives at the same just conclusion, substantially, with that already indicated as being reached by the House of Lords.

I. F. R.

RECENT AMERICAN DECISIONS.

Supreme Court of the United States—December Term, 1862.

THE CITY OF CHICAGO, PLAINTIFF IN ERROR, *vs.* ALLEN ROBBINS.

A., being the owner of real estate situated upon a street in a city, contracted with B. to erect a building thereon, which included an excavation of the sidewalk adjoining, so as to furnish light and air to the basement. Other contractors were employed to furnish gratings and flagging. Excavations in the sidewalk of a dangerous character were made by the contractor in the course of the work, to which the attention of A. was called by the city authorities. The city knew of the excavation of this and similar areas, and interposed no objection, though no express permission to make this one was given. While this condition of things continued, C. fell into the unprotected area and was injured. He brought an action against the city to recover damages. A. had knowledge of the pendency of the action, but he was not expressly notified to defend it; nor was he informed that the city would look to him for indemnity. A judgment was recovered against the city, which it was compelled to pay. In an action brought by the city against A., to be reimbursed the amount which it had paid under the judgment, *Held*,

1. Assuming that C. was injured through the fault of A., and that the city was not a wrongdoer, A. is concluded by the judgment recovered against the city. No express notice to him of the pendency of the action was necessary. It is enough that he knew it was pending, and could have defended it.
2. The excavation, though not a nuisance in itself, became such on account of the improper manner in which it was made. The city is not, however, for that